

89-334 (1)

Supreme Court, U.S.

FILED

AUG 26 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

PHILIP ORTEGA,
Petitioner,

v.

CITY OF KANSAS CITY, KANSAS,
A Municipal Corporation,
POLICE CHIEF ALLAN MEYERS,
DETECTIVE RANDALL MURPHY,
LT. RONALD L. MILLER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE 10th CIRCUIT COURT OF APPEALS

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August 25, 1989

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QUESTION PRESENTED

Did the 10th Circuit, in reversing a plaintiff's recovery in a civil rights action, err in holding that a person lured into a jurisdiction and arrested, has no constitutional right to extradition prior to arrest?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Philip Ortega, and the Respondents, City of Kansas City, Kansas, Police Chief Allan Meyers, Lt. Ronald Miller, Detective Randall Murphy and Detective Louis Johnson. There were three other defendants who proceeded to trial in the U.S. District Court, District of Kansas (Patrolman Joseph Ward, Patrolman Darrell Marmon, and Patrolman Bernard J. Smith), but all three were dismissed on the merits by the jury. None of the three were involved in the appeal to the 10th Circuit.

Petitioner is an individual, residing in the state of Missouri. The City of Kansas City, Kansas, one of the

Respondents, is a municipal corporation organized under the laws of the state of Kansas.

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PHILIP ORTEGA,
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CITY OF KANSAS CITY, KANSAS,
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POLICE CHIEF ALLAN MEYERS,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
10th CIRCUIT COURT OF APPEALS

Petitioner Philip Ortega
respectfully prays that a writ of
certiorari be issued to review the
judgment and opinion of the United

States Court of Appeals for 10th Circuit entered in the above entitled proceeding on May 31, 1989.

OPINIONS

The opinion of the Court of Appeals for the 10th Circuit is reported at 875 F.2d 1497, and is reprinted in the appendix hereto, page A-1, infra. A Motion for Rehearing En Banc was denied July 7, 1989.

The Memorandum and Order of the United States District Court for the District of Kansas (O'Connor D.J.) was reported at 659 F.Supp. 1201 (D.Kan., 1987) and is reprinted in the appendix hereto, page A-23, infra.

JURISDICTION

The Petitioner originally invoked federal jurisdiction under 42 U.S.C. §1983, and brought this suit in the Kansas District. After trial to a jury, occurring December 17-22, 1986, the jury returned a verdict in favor of plaintiff-petitioner against the City of Kansas City, Kansas and three of the seven individual defendants, awarding compensatory damages of \$12,500 and punitive damages totalling \$70,000 (\$40,000 against Police Chief Allan Meyers, \$20,000 against Lt. Ronald Miller and \$10,000 against Detective Randall Murphy).

On appeals by Respondents, the 10th Circuit on May 31, 1989, reversed the District Court's orders and held that

"luring a suspect into the state of Kansas for service of a facially valid warrant does not constitute a claim under 42 U.S.C. §1983." See page A-3, infra. A Motion for Rehearing En Banc was filed on June 9, 1989, which was denied July 7, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

(1) Article IV, Section 2, Clause 2 of the United States Constitution provides:

"A Person charged in any State, with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority, of the State from which he fled, be delivered up, to be removed to the State, having Jurisdiction of the Crime."

(2) The extradition clause of the United States Constitution is implemented by 18 U.S.C. §3182, which provides:

"Whenever the executive authority of any State or Territory demands any person from a fugitive from justice, of the executive authority of any State, District, or Territory, to which such person has fled, and produces a copy of an indictment or an affidavit made before a magistrate of any State or Territory, charging this person demanded with having committed treason, felony, or other crime, certified as authentic by governor or chief magistrate of this State or Territory from whence the person so charged fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and show cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within in 30 days from the time of the arrest, the person may be discharged."

STATEMENT OF THE CASE

Philip Ortega filed suit in U.S. District Court, District of Kansas, seeking damages from the City of Kansas City, Kansas, and several law enforcement officials under 42 U.S.C. §1983 for deprivation of extradition rights in connection with this arrest and "sting" operation. The claim was based on the arrest of Ortega on December 26, 1984.

Earlier in the fall of 1984, the city and its police officers initiated a sting operation, "Operation Express," to help arrest suspects on outstanding warrants. A police department computer operator entered the suspects' names into the computer and obtained an address for each suspect. This allowed

the police to mail notices to those suspects telling each of them to claim a package at a certain location in Kansas City, Kansas. One of the outstanding warrants was for a "Philip Ortega" residing at 2410 Indiana, Kansas City, Missouri, wanted for writing an insufficient funds check in the amount of \$49.92. That warrant identified Mr. Ortega as having a driver's license 0187-4373. When the computer operator entered Mr. Ortega's name into the computer, it displayed one address on Indiana Street and another address, on East 90th Terrace. The police department sent notices to both addresses.

The plaintiff, Philip Ortega, a 63-year-old white male received the notice at his home on 90th Terrace on

Christmas Eve, 1984. Two days later he crossed the Missouri-Kansas state line into Kansas City, Kansas, to pick up the "package," whereupon he was arrested despite his protests that he was the "wrong" Philip Ortega, and had never written a bad check. He was booked at the Wyandotte County jail, taken before a District Judge, and released on bond. Several days later, after obtaining counsel, Ortega convinced the judge that he was in fact not the same Philip Ortega sought in the warrant. Although the judge told him the charges would be dismissed, no entry of dismissal was ever entered into the record.

Ortega brought a civil action against the city and the police officers alleging, among other things, deprivation of extradition rights in

connection with the arrest. Several state law actions were joined, pursuant to pendent jurisdiction, but at the close of Ortega's evidence, the Court directed a verdict on all claims except the civil rights claim for the violation of the constitutional right to extradition. The trial Court instructed the jury that a criminal suspect has a right to extradition under Article IV, Section 2, Clause 2, of the United States Constitution, and that his right is implemented by both state and federal extradition statutes, which provide specific procedures for extraditing persons charged with crimes. The jury returned a verdict in favor of Ortega, awarding \$12,500 in compensatory damages and a total of \$70,000 in punitive damages.

Those defendants found liable appealed to the Tenth Circuit arguing, inter alia, that there are no pre-arrest rights to extradition. The Tenth Circuit panel, Circuit Judges Anderson, Seth, and Borby, reversed the trial court's rulings, and held "luring a suspect into the State of Kansas for service of a facially valid warrant does not constitute a claim under 42 U.S.C. §1983."

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Tenth Circuit panel in this case of first impression has in effect erased from the Constitution a substantial portion of the extradition guarantees granted to every person in the United States of

America. The Tenth Circuit interpreted that Constitutional clause and its implementing statute, 18 U.S.C. §3182, and became convinced "that the Constitutional dimension of extradition exists only when demand is made by one jurisdiction for the surrender of a person in another jurisdiction." (See Opinion, p. A-1 to A-22)

Petitioner submits that this interpretation by the Tenth Circuit not only ignores the plain meaning of the Constitutional provision and federal statute, but puts the judicial stamp of approval upon law enforcement trickery to avoid the safeguards of extradition. This gives law enforcement agencies carte blanche authority to ignore extradition procedures -- if police can be held liable for using extradition procedures

erroneously, but cannot be held liable for ignoring extradition procedures, police will never use extradition procedures unless absolutely necessary. If that Tenth Circuit decision is correct, it eliminates half of the extradition rights written into the Constitution, all in the interest of what the Respondents called in their brief "a cost effective means of law enforcement."

A casual review of 18 U.S.C. §3182 reveals that a person has rights under the federal extradition laws both prior to the arrest and after his arrest. The federal statute requires a demanding state to produce to the asylum state a certified copy of an indictment or affidavit charging the person with a crime, at which time the asylum state

authority "shall cause him to be arrested" and thereafter deliver the person to the demanding state. The federal statute does not require the asylum state to arrest a person before the demanding state takes any action towards requesting surrender, but instead places the burden upon the demanding state to convince asylum state authorities that there is a verified charge or indictment against the identified suspect which would provide the basis for an arrest.

The Tenth Circuit cited a 1902 judicial definition of extradition and a 1982 Fifth Circuit case for the proposition that the definition has endured decades of analysis, and concluded that "prior to executive demand by the requesting jurisdiction, a

criminal suspect does not have a constitutional right that supports a claim under 42 U.S.C. §1983." Appendix p. A-12.

Petitioner agrees that numerous extradition rights arise after an arrest, and even after a demand by the requesting jurisdiction, but submits that the "demand" is not a bright line before which no extradition rights exist.

The Tenth Circuit acknowledged there is "ample Circuit Court authority for the proposition that failure to comply with the provision of the Uniform Extradition Act as enacted by the detaining state can support recovery on §1983 claims." 875 F.2d at 1500. The panel then interpreted six different cases from six different circuits, and interpreted them narrowly to say a civil

rights violation of extradition rights occurs only after arrest and transportation of the suspect against his will. Id. Those cases are: Draper v. Coombs, 792 F.2d 915 (9th Cir. 1986); Ross v. Meagan, 638 F.2d 646 (3rd Cir. 1981); Crumley v. Snead, 620 F.2d 481 (5th Cir. 1980); Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980); Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977), cert denied 435 U.S. 933 (1978); and Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974).

The Tenth Circuit panel reasoned that because Kansas authorities did not arrest or restrain the liberty of Mr. Ortega outside its jurisdiction, nor cause this to be done, and because Kansas authorities did not transport or cause Mr. Ortega to be transported into

Kansas against his will, there were no federal rights violated by the Kansas officials and therefore no cause of action under 42 U.S.C. §1983. Id at 1501.

The Tenth Circuit disagreed with the trial court, which had held:

Regardless of whether a suspect is 'lured' across state lines, or brought over by state authorities after arrest in the asylum state, the same damage results to the individual. In either case, he is deprived of the benefits and procedural protections afforded by the Uniform Criminal Extradition Act.

Ortega v. City of Kansas City, Kansas
659 F.Supp. 1201, 1210 (D.Kan. 1987)

The Tenth Circuit disagreed and stated that "circumvention" of the law does not constitute a violation thereof, and "trickery" is not equivalent to force. 875 F.2d at 1501.

Petitioner submits that this is a case of first impression, and that despite exhaustive research, Petitioner has been unable to locate any cases dealing with rights to extradition prior to demand or arrest in an asylum state. Petitioner has no new case law or citations to provide to the United States Supreme Court, other than those submitted to the Tenth Circuit panel in his appellee brief, pages 22-35.

Petitioner cannot overemphasize that the panel decision denying any extradition rights prior to arrest or demand of a suspect ignores the very wording of the federal statute and the constitutional safeguard of extradition. Unless the state authorities comply with required extradition steps prior to demand and

arrest, no accused with ever be able to assert his right to a habeas corpus proceeding. By holding that no extradition rights arise until after a demand is made, the Tenth Circuit panel approved the use of trickery by police who choose not to use the available and long-established extradition procedures which have been part of federal law since 1793, when the original version of 18 U.S.C. §3182 was adopted.

Nothing illustrates this point -- the choice by city and police to circumvent the extradition rights of Mr. Ortega -- more than the dialogue during argument on defendants' Motion to Dismiss:

THE COURT: What about the claim in Count I that the plaintiff was denied his right to extradition; and the Tenth Circuit has specifically recognized a cause of action for abuse of the extradition process. What do you have to say about that?

MR. RYAN: Your Honor, it is our belief that the Tenth Circuit case, which I believe came out of Wyoming, indicates that the abuse of extradition occurs when an arrest is made and a person is brought over by force to the commanding [sic] state. We don't believe that this occurred in this case. We know that Mr. Ortega was not arrested in the state of Missouri and brought over to the state of Kansas. He was brought over here by reason of a notice.

THE COURT: But you clearly jumped a step by enticing him over here so that he lost his right to contest any question of identity, which he certainly could have done, and that's what the extradition is all about.

Trial Transcript, Volume IV, pp. 719-720. By having "jumped the step by enticing" Mr. Ortega across the state line into Kansas, Mr. Ortega was entirely deprived of his right to question the proper identity of the person named in the warrant.

The Tenth Circuit case noted by the District Court was Sanders v. Conine,

506 F.2d 530 (10th Cir. 1974), which had held that failure to comply with extradition laws stated a claim under the civil rights act. The Sanders case, along with five other cases noted at page 1500 of the Tenth Circuit decision, arguably stand for the proposition of any violation of extradition rights provide the basis for cause of action under 42 U.S.C. §1983.

Nonetheless, the Tenth Circuit stated in a conclusory fashion that neither the Constitution nor the implementing federal statute or state statutes purport to create an exclusive process, and that until a demand is made, there are no rights to extradition under the Constitution or the federal implementing statute. 875 F.2d at 1501. The Tenth Circuit panel stated

clearly (but in the opinion of Petitioner, erroneously) "we find nothing in the Constitution or in applicable federal statutes which would prohibit a state from luring a person into its jurisdiction to effect an arrest." Id.

The Tenth Circuit decision has made obsolete the procedures of extradition, with all its safeguards employed for more than 200 years, and replaced it with procedure of luring and enticing suspects across state lines. As the evidence clearly showed at trial and was known by defendants' records prior to sending the notices, the Philip Ortega wanted in the Kansas warrant was a 36-year-old black man living in a predominantly black residential area whose address was the same as listed on

the insufficient funds check of \$49.92, and who was known to have threatened police officers with physical violence. The Philip Ortega who is the Petitioner herein, was a 63-year-old white man living in a predominantly white residential area, and a successful businessman who had never written an insufficient funds check in his life or been arrested for anything before this arrest. Now, as a result of this arrest, petitioner has a criminal FBI and KBI arrest record; which may affect his ability to obtain financing for his real estate development business. All of this could and should have been avoided by proper use of the extradition laws.

Despite these discrepancies, Respondents chose to wholly ignore the

existing extradition procedures and instead employed trickery that amounted to mail fraud to entice the wrong Philip Ortega into Kansas for arrest (no package existed). It is highly improbable that Respondents could have convinced the Kansas governor to issue a demand for the arrest of Petitioner, a white 63-year-old man, and the real defendant, a black 36-year-old man, if Respondents had bothered to comply with the requirements of extradition. That did not stop the defendants from sending notices across the state line to both individuals.

It is unbelievable that the Tenth Circuit would hold that circumvention of the right to extradition is not a violation of the consitutional right to extradition. Petitioner submits that

this Tenth Circuit holding is an improper interpretation of the plain language of the extradition clause of the United States Constitution and 18 U.S.C. §3182.

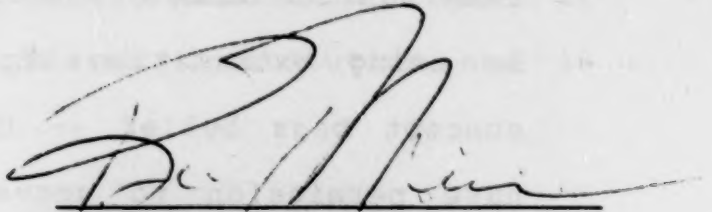
CONCLUSION

In this case of first impression, the Tenth Circuit panel by its opinion has granted police officers throughout the nation the freedom to wholly ignore extradition safeguards that have been in the Constitution for more than 200 years, and the federal implementing statute and its predecessors since 1793, and in the Uniform Criminal Extradition Act that had been adopted in Kansas approximately 50 years prior to Mr. Ortega's arrest. Police are now legally

free to escape liability by completely avoiding extradition procedures, rather than run the risk of incurring liability by using extradition improperly. This concept begs belief -- that police now have permission to conveniently forget extradition rights, and avoid all responsibility. Under this theory, police can entice everyone to be arrested, regardless of the number of persons, their age, or race, so long as they have the same name. Surely, our laws cannot condone such a clear violation of an innocent person's rights.

For all these reasons, this Petition for Certiorari should be granted so that the District Court determination, and jury award to the plaintiff, can be reinstated, and the case remanded to the Tenth Circuit for determination of other

issues raised on that appeal, but which were not addressed by the Tenth Circuit panel.

A large, stylized handwritten signature in dark ink, likely belonging to Richard T. Merker, is written over a horizontal line.

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August 25, 1989

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PHILIP ORTEGA,

Plaintiff-Appellee/Cross-
Appellant,

v.

Nos. 87-1475 & 87-1520

THE CITY OF KANSAS CITY, KANSAS,
A Municipal Corporation, POLICE
CHIEF ALLAN MEYERS, DETECTIVE
RANDALL MURPHY, LT. RONALD L.
MILLER, DETECTIVE LOUIS JOHNSON,
PATROLMAN JOSEPH WARD, PATROLMAN
DARRELL MARMON, PATROLMAN BERNARD
J. SMITH,

Defendants-Appellants/Cross-
Appellees

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF KANSAS
CIV. NO. 85-2054-0

BRORBY, Circuit Judge.

Philip Ortega (Ortega) sought damages from the City of Kansas City, Kansas (the City), and multiple law enforcement officials (the Officials), under 42 U.S.C. §1983 (1981) for deprivation of extradition rights in connection with his arrest in a sting operation. The jury returned a verdict against the City and the Officials, and awarded Ortega compensatory damages in the amount of \$12,500.00 and punitive damages totaling \$70,000.00 against the individual officers. The trial court denied the City and the officials' Motion for Judgment Notwithstanding the Verdict, New Trial and/or Remittitur, and granted Ortega's Motion for Attorney's Fees. The Memorandum and Order denying the Motion is published in Ortega v. City of Kansas City, Kansas,

659 F. Supp. 1201 (D.Kan. 1987). The City and the Officials appeal the denial of their motion. Challenging the amount of fees awarded, Ortega cross-appeals the trial court's grant of attorney's fees. We REVERSE the trial court's ruling on the Motion for Judgment Notwithstanding the Verdict, New Trial and/or Remittitur, and hold that luring a suspect into the state of Kansas for service of a facially valid warrant does not constitute a claim under 42 U.S.C. §1983.

FACTS

In the fall of 1984, the City and its Officials initiated a sting operation entitled "Operation Express" to facilitate the arrest of a large

number of suspects on outstanding warrants. A computer operator for the Kansas City, Kansas, Police Department entered the suspects' names into the computer and obtained an [page 3] address for each suspect. The police department mailed notices to the suspects telling each of them to claim a package in Kansas City, Kansas. One of the outstanding warrants was for a "Philip Ortega," residing on Indiana Street in Kansas City, Missouri. Although the warrant did not so identify the suspect, he was a thirty-five-year-old black male. When the computer operator entered Ortega's name into the computer, two addresses were displayed: one at the Indiana Street address and another at 90th Terrace, Kansas City, Missouri. The

police department sent notices to both addresses.

Philip Ortega, a sixty-five-year-old white male, received the notice at his home on 90th Terrace in Kansas City, Missouri, on December 24, 1984. On December 26, he crossed the Missouri-Kansas state line into Kansas City, Knasas, to pick up his package, whereupon he was arrested despite his protests that he was the "wrong" Philip — Ortega. He was booked at the Wyandotte County Jail, taken before a District Judge, and released on bond. Several days later, after obtaining counsel, Ortega convinced the judge that he was in fact not the same Philip Ortega sought in the warrant. Although the judge told him the charges would be

dismissed, no entry of dismissal was ever entered into the record.

Ortega brought a civil action against the City and the Officials under 42 U.S.C. §1983 for deprivation of liberty without due process and deprivation of extradition rights in connection with his arrest. At the close of Ortega's evidence, [page 4] the court directed a verdict on all claims except the claim under 42 U.S.C. §1983 for a violation of his so-called constitutional right to extradition. The trial court instructed the jury that a criminal suspect has a right to extradition under Article IV, Section 2, Clause 2 of the United States Constitution and that his right is implemented by both state and federal

extradition statutes, which provide specific procedures for extraditing persons charged with crimes. The trial court further instructed the jury that they could find the City and the Officials liable under 42 U.S.C. §1983 if they found that the City and the Officials lured Ortega into Kansas and arrested and detained him in violation of the extradition laws. The jury returned a verdict in favor of Ortega and awarded him damages totaling \$82,500.00.

ISSUE

The dispositive issue in this appeal is whether the trial court erred in determining that a suspect charged with a crime on a facially valid warrant has

a constitutional right to extradition prior to arrest. We review the trial court's rulings on the Motion for New Trial under the abuse of discretion standard. Harvey v. General Motors Corp., ____ F.2d ____ (10th Cir. 1989) (No. 87-2593—filed April 25, 1989). We review the trial court's ruling on the Motion for Judgment Notwithstanding the Verdict de novo. Guilfoyle v. Missouri, Kan., & Tex. R. Co., 812 F.2d 1290, 1292 (10th Cir. 1987). We agree with the City and the Officials that a criminal suspect has no pre-arrest extradition rights, the violation of which gives rise to a cause of action under 42 U.S.C. §1983. [page 5]

ANALYSIS

The original authority for interstate extradition is the United States Constitution, Article IV, Section 2, Clause 2, which provides:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

(Emphasis added.) Congress implemented this provision through 18 U.S.C. §3182 (1985), which provides for interstate cooperation in the apprehension and delivery of fugitives on demand from the executive authority of the requesting state, district, or territory from which the person fled. The statute implementing the constitutional provision provides:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.
[page 6]

(Emphasis added.) 18 U.S.C. §3182. By adopting versions of the Uniform Criminal Extradition Act, the states have set for the requirements of interstate rendition.¹ The Kansas

Uniform Criminal Extradition Act is published at Kan. Stat. Ann §22-2701 through 22-2730 (1988).

The plain meaning of both Article IV, Section 2, Clause 2, and 18 U.S.C. §3182 convinces us that the constitutional dimension of extradition exists only when demand is made by one jurisdiction for the surrender of a person in another jurisdiction. The classic definition of "extradition" is found in Terlinden v. Ames, 184 U.S. 270 (1902):

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted or an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.

Id. at 289. This definition has endured decades of application and analysis. Tavarez v. United States Attorney Gen., 668 F.2d 805, 810 (5th Cir. 1982). The notions of demand and surrender are critical to interstate rendition as well. See Innes v. Tobin, 240 U.S. 127, 133 (1916). Prior to executive demand by the requesting

1 For discussion of the development of law in this area, see Abramson, Extradition in America: Of Uniform Acts and Governmental Discretion, 33 Baylor L. Rev. 793 (1981); Comment, Interstate Rendition Violations and Section 1983: Locating the Federal Rights of Fugitives, 50 Fordham L. Rev. 1268 (1982).

[page 7] jurisdiction, a criminal suspect does not have a constitutional right that supports a claim under 42 U.S.c. §1983.

Although we find no Supreme Court precedent concerning §1983 claims for the violation of extradition rights, there is ample circuit court authority for the proposition that failure to

comply with the provisions of the Uniform Extradition Act as enacted by the detaining state can support recovery on §1983 claims. Draper v. Coombs, 792 F.2d 915, 919-20 (9th Cir. 1986) (forcible return of arrestee from Oregon to Washington without process supported a claim under 42 U.S.C. §1983 for violation of extradition rights); Ross v. Meagan, 638 F.2d 646, 649-50 (3d Cir. 1981) (allegations of violating the Uniform Criminal Extradition Act in failing to comply with post-arrest extradition procedures constituted a claim under 42 U.S.C. 1983); Crumley v. Sneed, 620 F.2d 481, 483 (5th Cir. 1980) (delivery of in-custody plaintiff to another jurisdiction while petition for writ of habeas corpus pending could entitle plaintiff to relief under 42

U.S.C. §1983); Brown v. Nutsch, 619 F.2d 758, 764 (8th Cir. 1980) (complaint alleging forcible seizure and interstate transportation or arrestee sufficiently alleged cause of action under 42 U.S.C. §1983); Wirth v. Surles, 562 F.2d 319, 323 (4th Cir. 1977), cert. denied, 435 U.S. 933 (1978) (complaint alleging arrest and transportation of fugitive across state line without extradition proceedings stated a claim under 42 U.S.C. §1983); Sanders v. Conine, 506 F.2d 530, 532 (10th Cir. 1974) (abuse of extradition power by noncompliance with applicable extradition law in transporting [page 8] arrestee out of state without court proceedings state a claim under 42 U.S.C. §1983. In each of these cases plaintiff was restrained or deprived of his liberty outside the

jurisdiction of the state issuing the warrant and then transported against his will.

The question presented by this appeal, however, is not so simple. At the time of this arrest, Ortega was within the boundaries of Kansas, the jurisdiction which had issued the warrant for his arrest.² The City and the Officials argue that because Ortega was not arrested in his asylum state of Missouri, he had no right to be delivered to Kansas under the procedures set forth in the Uniform Criminal Extradition Act. We agree. Because Ortega was arrested in Kansas, Kansas authorities did not make a demand on Missouri to surrender their resident. Consequently he had no right to extradition proceedings.

Further, the Uniform Criminal Extradition Act does not establish an exclusive procedure by which law enforcement officials may arrest non-residents. In its Memorandum and Order published in Ortega v. City of Kansas City, Kansas 659 F. Supp.

2 Even though he was the "wrong" Philip Ortega, the warrant was facially valid. The manner in which the City and the Officials carried out their duties, resulting in the most unfortunate arrest of the wrong person, has no bearing on our resolution of the dispositive issue of this appeal. 42 U.S.C. §1083 does not provide a remedy for every wrong; rather, §1983 provides a remedy for persons who, under color of law, suffer deprivation of "rights, privileges, or immunities secured by the Constitution and laws." See City of Anton, Ohio v. Harris, ____ U.S. ____, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)

[page 9]
1201, 1210 (D. Kan. 1987), the trial court stated that the Kansas Uniform

Criminal Act "clearly provide[s] for the right to extradition prior to arrest."

We cannot agree. The Kansas Uniform Criminal Extradition Act sets forth the procedures to be used when Kansas authorities choose to demand surrender of a non-resident whom they have no ability to serve. These state procedures do not create federal constitutional rights where otherwise they do not exist.

We are not persuaded that circumvention of the Kansas Uniform Criminal Extradition Act constitutes violation thereof. The trial court equated luring with arrest or restraint of liberty:

Regardless of whether a suspect is 'lured' across state lines, or brought over by state authorities after arrest in the asylum state,

the same damage results to the individual. In either case, he is deprived of the benefits and procedural protections afforded by the Uniform Criminal Extradition Act.

Id. at 1210. We cannot endorse the trial court's equation of trickery with force.

The trial court reasoned that our holding in Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974), precludes arrest through a sting operation such as "Operation Express." We cannot agree. In Sanders, Wyoming authorities arrested the suspect in Wyoming. Without process, they delivered him to Indiana authorities. Clearly, when Wyoming authorities assisted Indiana authorities in detaining the suspect, he was entitled to the procedural [page 10] protections of the Wyoming Uniform Extradition Act. In Sanders, we stated:

The Wyoming version of the Uniform Extradition Act provides ... that a person arrested without warrant upon reasonable information that he is charged in courts of another state for specified offenses "must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for arrest."

Id. at 532. We premised our opinion in Sanders on the fact that the individual whose rights were violated was detained in an asylum state. In creating for non-residents a constitutional right to be arrested only through extradition procedures, the trial court applied our holding in Sanders far beyond our intent.

We find nothing in the Constitution or in applicable federal statutes which would prohibit a state from luring a person into its jurisdiction to effect an arrest. The Constitution requires an

asylum state to deliver a fugitive to the receiving state upon demand. The federal enabling act, 18 U.S.C. §3182, and the various state enactments of the Uniform Extradition Act are designed to implement and facilitate this process. Neither the Constitution nor the Uniform Acts purport to create an exclusive process. In the instant case, Kansas did not: (1) arrest or in any way restrain the liberty of the plaintiff outside its jurisdiction nor did it cause this to be done; and, (2) transport or cause the plaintiff to be transported into its jurisdiction against his will. In this case, authorities in Kansas lured Ortega into Kansas by trickery. No force, threat of force, arrest or restraint of Ortega's liberty occurred outside the jurisdiction of Kansas.

CONCLUSION

Under the facts of this case, we hold the arrest of a non-resident in the state of Kansas by Kansas authorities does not give rise to a claim under 42 U.S.C. §1983 for violation of the constitutional right to extradition. In this appeal, the City and the Officials raise additional issues as follows: Whether the trial court erred in determinng that the Officials were not entitled to qualified immunity; whether the trial court erred in failing to reduce the award of actual and punitive damages; and whether the trial court erred in failing to strike a certain juror from the jury. On cross-appeal, Ortega raised the following issue:

Whether the trial court erred in determining the amount of attorney's fees awarded. Because we reverse the trial court on the dispositive issue before us, we do not address these issues.

REVERSED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

PHILIP ORTEGA,

Plaintiff,

v.

CIVIL ACTION

No. 85-2054

CITY OF KANSAS CITY, KANSAS,
a Municipal Corporation, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the court upon the following motions: (1) defendants' motions for judgment notwithstanding the verdict, new trial and/or remittitur; (2) plaintiff's motion for attorney's fees; and (3) defendants' motion for review of the clerk's taxation of costs.

Trial to a jury was held on December 17-22, 1986. Plaintiff presented

evidence as to the following: In the Fall of 1984, defendants initiated a sting operating entitled "Operation Express" to facilitate the arrest of a large number of suspects for which outstanding warrants existed. A computer operator for the Kansas City, Kansas, Police Department was given a list of names for which outstanding warrants existed. She entered the suspects' names into the computer and it displayed an address for each suspect. Notices were then mailed to the suspects telling them to claim a package in Kansas City, Kansas. One of the outstanding warrants was for a "Philip Ortega," residing on Indiana Street in Kansas City, Missouri. [page 2] Although the warrant did not so identify the suspect, he was a 35-year-old black

male. When the computer operator entered Ortega's name into the computer, two addresses were displayed: one at the Indiana Street address and another at a 90th Terrace, Kansas City, Missouri address. Notices were sent to both addresses.

The plaintiff, Philip Ortega, a 65-year-old white male, received the notice at his home on 90th Terrace in Kansas City, Missouri, on December 24, 1984. On December 26, plaintiff crossed the Missouri-Kansas state line into Kansas City, Kansas, to pick up his package, whereupon he was arrested despite his protests that he was the "wrong" Philip Ortega. Plaintiff was booked at the Wyandotte County Jail, taken before a District Judge and released on bond. Several days later,

after obtaining counsel, plaintiff convinced the judge that he was in fact not the same Philip Ortega sought in the warrant. Although the judge told plaintiff that the charges would be dismissed, no entry of dismissal was ever entered into the record.

At the close of plaintiff's evidence, the court directed a verdict on all claims except plaintiff's claim under 42 U.S.C., §1983 for a violation of his constitutional right to extradition. The jury was instructed that a criminal suspect has a right to extradition under Article IV, Sec. 2, cl. 2 of the United States Constitution and that this right is implemented by both state and federal extradition statutes which provide specific procedures for extraditing persons

charged with a crime. The jury was further instructed that they could [page 3] find a defendant liable under Section 1983 if they found that the defendant lured plaintiff into Kansas and arrested and detained him in violation of the extradition laws.

The jury returned a verdict in favor of plaintiff against the City of Kansas City, Kansas, [hereinafter "the City"] and three of the individual defendants. The jury awarded compensatory damages in the amount of \$12,500 and punitive damages totalling \$70,000 against the individual defendants.

I. Defendants' Motions for Judgment Notwithstanding the Verdict. New Trial and/or Remittitur.

A. Motion for Judgement Notwithstanding the Verdict.

In Flood v. Wisconsin Real Estate Investment Trust, 503 F. Supp. 1157 (D. Kan. 1980) we discussed the proper standard to be applied to a motion for judgment notwithstanding the verdict:

In considering a motion for a judgment n.o.v. the evidence must be viewed in the light most favorable to the party against whom the motion is made. A judgment n.o.v. may [not] be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. It is not the Court's duty to weigh the evidence presented, or to pass on the credibility of witnesses, or to substitute its judgment of the facts for that of the jury.

Id. at 1159 (citations omitted).

The court has carefully reviewed the evidence presented at trial and the issues of fact that were to be determined. The court finds that the record contains sufficient evidence to

support the jury's findings. Defendants' motion for judgment notwithstanding the verdict will therefore be denied. [page 4]

B. Motion for New Trial.

The standard for granting a new trial is less rigorous than the standard for granting judgment notwithstanding the verdict. In ruling on a motion for a new trial, the trial judge has extremely broad discretion. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 37 (1980). We recently set forth the standard for granting a motion for a new trial in Commons v. Montgomery Ward & Co. 614 F. Supp. 443 (D. Kan. 1985):

[T]he trial judge has the obligation or duty to ensure that justice is done, and, when justice so requires, he has the authority to set aside the jury's verdict. He may do so when he believes the verdict to be

against the weight of the evidence or when prejudicial error has entered the record. In considering a motion for new trial, the court is permitted to weigh the evidence and it may order a new trial even if there is evidence to support the jury's verdict.

Id. at 449 (citations omitted).

Defendants raise numerous arguments in support of their motion for new trial. The court will address each of these arguments individually.

1. Qualified Immunity.

Defendants argue that the court erred in holding that the individual defendants were not entitled to the defense of qualified immunity. The doctrine of qualified immunity provides that "governmental officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 447 U.S. 800, 818 (1982). In Harlow, the court reformulated the [page 5] standard for determining qualified immunity. Prior to Harlow, the qualified immunity test had two prongs: one objective and one subjective. See, e.g., Wood v. Strickland, 420 U.S. 308, 322 (1975). Because the Court became concerned that the subjective or so-called "good faith" component entailed wide-ranging discovery into the official's motivation, the Court in Harlow eliminated the subjective prong and any need to inquire as to whether the official was acting in good faith. See Harlow, 457 U.S. at 816-17.¹

In Lutz v. Weld County School District, 784 F.2d 340 (10th Cir. 1986), the Tenth Circuit analyzed the Harlow decision and set forth the steps for determining whether a defendant is entitled to the qualified immunity defense. Initially, defendants must properly raise the defense of qualified immunity, i.e., they must assert that they were performing discretionary functions. Id. at 342. Plaintiff then has the burden to convince the court that the law relied upon by plaintiff was clearly established at the time the defendants allegedly deprived plaintiff of his or her civil rights. Id. at 342-43. Whether the law was clearly established when the conduct complained of occurred is a legal issue to be resolved by the court. Id. at 343. If

a plaintiff fails to convince the court that the law was clearly established, the defendants are qualifiedly immune and the court must enter judgment in favor of the defendants who have pled the defense. Id. If, on the other hand, the plaintiff convinces the court that the law was

1/ Because the Court in Harlow clearly rejected the "good faith" analysis, we need not address any of defendants' good faith arguments. [page 6]

clearly established, the court must proceed to determine whether the defendants have raised a fact issue as to whether "exceptional circumstances" existed such that reasonable persons in their position would not have known of the relevant legal standard. Id. If the defendants raise such a fact issue, the defendants are entitled to a jury

instruction on the defense. If no fact issue is raised, defendants are not entitled to the defense as a matter of law. Id.

We will proceed to apply each of these steps to determine whether the defendants were entitled to the defense of qualified immunity. Initially, the court finds that defendants properly raised the defense. Decisions as to when and how to execute arrest warrants and whether to initiate sting operations such as Operation Express are matters clearly within the discretionary authority of a police department and its officers.

We must next decide whether plaintiff has met his burden in convincing us that the law was "clearly established" at the time of the

defendants' wrongful conduct. As a threshold matter, we must decide the standard for determining whether the law was "clearly established." In Harlow, the court declined to decide whether the state of the law is to be evaluated by reference to opinions of the Supreme Court, Court of Appeals, or the local District Court. 457 U.S. at 818 N.32.

In the absence of clear-cut guidance from the Supreme Court, courts have taken varying approaches in defining the "clearly established" standard. According to the [page 7] Ninth Circuit, the court should look for binding precedent on any level; in the absence of such precedent, the court should look to all available decisional law, including decisions of state courts, circuit courts and district

courts. Chilicky v. Schweiker, 796 F.2d 1131, 1138 (9th Cir. 1986); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). The court should also evaluate the likelihood that the Supreme Court or applicable circuit court would have reached the same result as the courts that have already addressed the issue. Chilicky, 796 F.2d at 1138.

The Third Circuit has recognized the ambiguous nature of the "clearly established" standard, See People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144 (3d Cir. 1984), and has yet to set forth a specific standard. In a recent case, however, the Third Circuit examined other Third Circuit cases to determine whether the rights were clearly established. See Sourbeer v.

Robinson, 791 F.2d 1094, 1103 (3d Cir.),
petition for cert. filed, 55 U.S.L.W.
3186 (U.S. Sept. 12, 1986). The Court
of Appeals for the District of Columbia
has also refused to formulate a detailed
rule. It recognizes, however, that
Supreme Court precedent "clearly
establishes" the law. See Hobson v.
Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984),
cert. denied, 470 U.S. 1084 (1985). The
circuit has not had the opportunity to
further define what amounts to well
established law because, as it notes,
the cases to come before it have been at
the extreme ends of the spectrum where
the illegality of the conduct alleged
was established "by [page 8] any
reasonable definition of the phrase."
Id.; Zweibon v. Mitchell, 720 F.2d 162,
169 (D.C. Cir. 1983), cert. denied, 469
U.S. 880 (1984).

Similarly, the Seventh Circuit has declined to formulate a specific rule. Generally speaking, it encourages the trial court to look to cases from all levels of the federal courts and from a variety of jurisdictions. See Crowder v. Lash, 687 F.2d 996, 1001-02 (7th Cir. 1982). On the other hand, the District Court for the District of New Jersey has adopted a strict rule. It holds that the law is clearly established if an unrefuted published district court opinion exists within the district where the defendants' alleged wrongful conduct occurred. See James v. Price, 602 F. supp. 843, 846-47 (D.N.J. 1985).

Although we are unable to synthesize a specific rule from these cases that would apply to all actions,

they do provide some guidance. Without a doubt, a Supreme Court case on point would "clearly establish" the law. We also believe that an opinion from the Circuit Court of Appeals in which the defendants' conduct occurred would satisfactorily establish the law, especially if the opinion was in line with a majority of other courts.

Applying these general guidelines to the case before us, we first find that no Supreme Court precedent exist concerning section 1983 claims for the violation of extradition rights. There is, however, appellate level precedent. The Tenth Circuit in 1974 held that "[a] complaint which charges abuse of the extradition power by noncompliance with applicable law states a claim under 42 U.S.C. §1983."

Sanders [page 9] v. Conine, 506 F.2d 530, 532 (10th Cir. 1974). The Tenth Circuit's holding is in accord with all but one of the circuit courts that have addressed this issue prior to the time the defendants' wrongful conduct occurred.² See Ross v. Meagan, 638 F.2d 646, 649-50 (3d Cir. 1981); Crumley v. Sneed, 620 F.2d 481, 4834 (5th Cir. 1980); Brown v. Nutsch, 619 F.2d 758, 764 (8th Cir. 1980); McBride v. Soos, 594 F.2d 610, 613 (7th Cir. 1979); Wirth v. Surles, 562 F.2d 319, 423 (4th Cir. 1977), cert. denied, 435 U.S. 933 (1978). The Sixth Circuit is the only appellate court that has declined to recognize a section 1983 cause of action for violation of extradition rights. See Stockwell v. Friberg, 272 F.2d 386, 386 (6th Cir. 1959). See also Martin v.

Sams, 600 F.Supp. 71, 72 (E.D. Tenn. 1984).

We conclude that, in 1984, when the defendants' wrongful conduct occurred, the law was clearly established that plaintiff had a right to extradition protected by section 1983. The Tenth Circuit's decision in Sanders is binding precedent. Reasonable police officers conducting police activities in this circuit should have known that the Sanders case was the applicable law in 1984 and should have patterned their conduct in accordance with it. Given that the Sanders rule is clearly the majority rule, reasonable officers would have had no reason to doubt its validity or seriously question whether the United States Supreme Court would hold the same way if confronted with the same issue.

2/ The Tenth Circuit's decision in Sanders continues to be in accord with the majority of federal appellate courts. The Ninth Circuit recently addressed this issue and held that a violation of extradition laws may serve as the basis for a section 1983 claim. See Draper v. Coombs, 792 F.2d 915, 919 (9th Cir. 1986) [page 10]

Having decided that the Sanders case was the well established law, we must next decide an even more perplexing issue: Are the facts in Sanders sufficiently similar to those in the instant case? The court in Harlow suggested that there must be some factual correlation between the applicable precedents and the case at issue. As the court noted in Harlow, a public official should not be required to "anticipate subsequent legal developments" or to know that "the law forbade conduct not previously

identified as unlawful." 457 U.S. at 818.

Again, in the absence of clear guidance from the Supreme Court, courts have taken differing approaches to this issue. Some courts have required a strict factual identity between the "establishing" case and the case at issue. See e.g., National Black Police Assoc. v. Velde, 712 F.2d 569, 576 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1012 (1983); Piccollela v. Rieck, 555 F. Supp. 27, 28 (S.D.N.Y. 1982). Other courts have required only that the officials know and apply general legal principles in appropriate factual settings. See, e.g., Hicks v. Feeney, 770 F.2d 375, 379-80 (3d Cir. 1985);

Williams v. Bennett, 689 F.2d 1370, 1381-82 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983); Anderson v. Central Point School District No. 6, 554 F. Supp. 600, 608 (D. Ore. 1982), aff'd, 746 F.2d 505 (9th Cir. 1984); Nakao v. Rushen, 545 F. Supp. 1091, 1092-93 (N.D. Cal. 1982). Still other courts require no factual similarity between the precedent and the case at hand and demand that the defendant [page 11] anticipate legal developments in accordance with discernible trends in the law. See, e.g., Forsyth v. Kleindienst, 551 F. Supp. 1247, 1253-58 (E.D. Pa. 1982).

We believe the second approach, i.e., requiring officials to know and apply general legal principles, to be the most reasonable and in line with the

Court's decision in Harlow. This approach strikes the necessary balance between the desire to compensate the victims whose rights have been deprived and the concern that the fear of liability will deter officials from ardently discharging their duties. See Harlow, 457 U.S. at 814. It is a flexible approach that requires the public official to make only a reasonable inquiry into the general legal principles. It does not require the official to anticipate the evolution of constitutional law, a task that even learned and experienced federal judges frequently have difficulty performing. See McSurely v. McClellan, 753 F.2d 88, 100 (D.C. Cir.), cert. denied, 106 S.Ct. 525 (1985). On the other hand, it does not allow the official to escape

liability merely because of a factual wrinkle in a case. To insist on a precise factual correspondence between the case at issue and the reported case law would be tantamount to giving every official license to commit one liability-free violation of a constitutional or statutory right. See People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 145 (3d Cir. 1984).

Applying this flexible rule to the case at hand, we conclude that the individual defendants should have known and applied the general legal principle set forth in [page 12] Sanders to the facts of this case. As we noted above, Sanders established a general rule that an official who abuses the extradition process by failing to comply with

"applicable law" is liable under section 1983. 506 F.2d at 532. The "applicable law" at issue in Sanders included not only Article IV of the Constitution, but also its implementing federal statute, 18 U.S.C. §3182, and the state of Wyoming's Uniform Extradition Act. The state of Kansas has adopted an almost identical version of the Uniform Extradition Act. See K.S.A. 22-2701, et seq. Consequently, the individual defendants in this case easily should have known that their failure to comply with Kansas extradition laws would make them amenable to suit under section 1983.

Notwithstanding the fact that the Sanders decision dealt with almost identical state laws, defendants argue that the case is too factually dissimilar to apply to the instant

action. In Sanders, the section 1983 plaintiff sued the asylum state for failing to comply with the state's extradition statutes. Plaintiff alleged that he was arrested in the asylum state without a warrant, that he was refused a lawyer, and never taken before a judge as required by the asylum state's extradition laws. He was then extradited to another state on the charges. In contrast, the plaintiff in the case at hand, was never arrested in the asylum state. Instead, defendants' sting operation "enticed" or "lured" plaintiff to cross the state line in violation of Kansas extradition laws and plaintiff was arrested only after he had arrived in the state of Kansas. Defendants argue that these two specific factual dis- [page 13] similarities

preclude the application of Sanders. We do not agree with defendants' arguments and find that these dissimilarities are immaterial.

Sanders set forth a general rule that violation of a state's extradition laws is actionable under section 1983. The court's opinion was not necessarily restricted narrowly to the facts of that case. Furthermore, the Sanders court held that the state extradition laws benefit the individual and not the state. Id. Regardless of whether a suspect is "lured" across state lines, or brought over by state authorities after arrest in the asylum state, the same damage results to the individual. In either case, he is deprived of the benefits and procedural protections afforded by the Uniform

Extradition Act. In sum, we find that Sanders is sufficiently similar to the case at bar to hold the individual defendants accountable for having knowledge of the case and applying its general legal principles to the facts at hand.

Furthermore, we find that the Kansas Uniform Criminal Extradition Act, K.S.A. 22-2701 et seq., was itself clearly established at the time the defendants' wrongful conduct occurred. The Kansas Legislature enacted the Uniform Criminal Extradition Act in 1937, as drafted by the National Conference of Commissioners on Uniform State laws. Preliminary Note, Judicial Counsel, Article 27, Kansas Statutes Annotated. Only a few amendments have been made since that time. Id. The Act

sets forth specific, detailed procedures for arresting and extraditing suspects. These laws clearly provide for the right [page 14] to extradition prior to arrest. See K.S.A. 22-2703 to -2710.³ These statutes would put a reasonable police chief and officers on notice that using a sting operation to "lure" or "entice" a suspect across state lines for the purpose of arresting him would violate the extradition act.

3/ Pursuant to the Kansas Uniform Criminal Extradition Act, the Governor of any state (in this case Missouri) has the duty to arrest and deliver to the executive authority of Kansas any person charged in Kansas with a crime who has fled from justice into Missouri. See K.S.A. 22-2702. In order to bring about the extradition of a person charged to Kansas, the executive authority of Kansas must inform the Governor of Missouri in writing that the accused was present in Kansas at the time of the commission of the alleged crime and that he thereafter

fled from Kansas. This written notice must be accompanied by an indictment or an affidavit made before a Kansas magistrate or judge, and an arrest warrant. The affidavit must substantially charge the person with having committed a crime in Kansas, and the copy of the affidavit must be authenticated by the executive authority of Kansas. K.S.A. 22-2703.

When demand is made upon the Governor of Missouri to surrender the accused to Kansas authorities, the Governor may investigate the demand and determine the situation and circumstances of the accused and whether he ought to be surrendered. K.S.A. 22-2704. If the Governor of Missouri determines that the demand should be complied with, he must sign an arrest warrant and direct peace officers in the state of Missouri to arrest the accused. The warrant must substantially recite the facts necessary to the validity of its issuance. K.S.A. 22-2707.

After the accused is arrested, he must be taken before a Missouri judge who must inform the accused of the charges and the right to counsel. If the accused states that he desires to test the legality of his arrest, he may apply for a writ of habeas corpus. The authorities from Kansas are notified, and a hearing is held in the Missouri court on the suspect's writ. If the

writ is denied, the suspect is turned over to the Kansas authorities. If the writ is granted, the accused is released. K.S.A. 22-2710. [page 15]

We recognize that in the ordinary case, an official's violation of clearly established state statutes does not deprive an official of qualified immunity. See Davis v. Scherer, 468 U.S. 183, 194-96 (1984). When, however, the state statute is itself the basis of the suit, i.e., when the state statute creates the cause of action under section 1983, then the officials' violation of the statute, if clearly established, will defeat immunity. Id. at 194-95. The instant action is one of those rare cases in which the state statute, i.e., the Kansas Uniform Criminal Extradition Act, is in fact the basis for the section 1983 claim.

In light of the foregoing, we hold that plaintiff has met his burden in convincing us that both the case law and the statutory law were so well established that reasonable persons in the place of the defendants would have known that they were violating the plaintiff's federally protected rights to extradition. Since plaintiff has convinced us that the law was clearly established, we must proceed to determine whether defendants raised a sufficient fact issue as to whether "exceptional circumstances" existed such that a reasonable police chief and officers in the defendants' position would not have known of the relevant legal standard.

Defendants argue that their reliance on the advice of the United

States Postal Inspector, United States Postmaster and Wyandotte County District Attorney raised sufficient evidence of "extraordinary circumstances" to require submission of this issue to the jury. This court has previously held that reliance on the advice of counsel in certain circumstances rises to the level of extraordinary circumstances. [page 16] See Burk v. Unified School District No. 329, ___ F. Supp. ___, (D. Kan., Jan. 30, 1987). The court, however, does not find that sufficient evidence existed in the instant case to permit the jury to decide the issue given that (1) the advice sought by defendants from the United States Marshal Service was limited to the Marshal's prior involvement in other sting operations; (2) the advice sought from the United

States Postmaster was whether the postal service would take part in the sting or would allow the police officers to masquerade as postal employees; and (3) the advice sought from the District Attorney was whether his office would cooperate in clearing out a large number of outstanding warrants. There was simply no evidence that the defendants asked the staff of the City Attorney's office for legal advice as to the propriety of mailing notices to out-of-state suspects, nor was there evidence that the defendants questioned the District Attorney about this issue. Consequently, we hold that we properly refused to allow the jury to decide whether defendants were entitled to qualified immunity under the "extraordinary circumstances" exception.

In light of the foregoing analysis, the court concludes that no error occurred when the court determined at trial that defendants were not entitled to the defense of qualified immunity. Defendants' motion for new trial based on the qualified immunity doctrine will therefore be denied.

2. Good Faith.

Defendants make a related argument that the court erred in sustaining plaintiff's counsel's objections to defendants' counsel's good faith closing arguments and in admonishing the jury that good faith was not an issue in the [page 17] case. Defendants support their argument with no authority. As we discussed above in part one, the "good faith" of a defendant official is no longer a

defense to unconstitutional conduct. See Harlow v. Fitzgerald, 457 U.S. 800, 816-17 (1982). Defendants' argument is therefore totally without merit. Defendants' motion for new trial based on this issue will be denied.

3. Municipal Policy.

Defendants argue that there was insufficient evidence for the jury to infer that a municipal policy existed to deprive the plaintiff of his right to extradition. Liability may be imposed on a city only for injuries inflicted pursuant to municipal "policy or custom." Monnell v. New York City Department of Social Services, 436 U.S. 618, 694 (1978). This requirement is intended to prevent imposition of municipal liability under circumstances where no wrong may be ascribed to the

municipal policymakers. City of Oklahoma City v. Tuttle, 471 U.S. 808, 821 (1985). The word "policy" generally "implies a course of action consciously chosen from among various alternatives." Id. at 823. At a bare minimum, an affirmative link must exist between the policy and the particular wrongful conduct alleged such that the particular policy is the "moving force" behind the wrongful conduct. Id. Accordingly, municipal liability under section 1983 attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 106 S. Ct. 1292, [page 18]

1300 (1986). In those circumstances, municipal liability may attach to a single decision to take unlawful action. Id.

Applying these standards to the case before us, we have little difficulty concluding that the evidence was sufficiently substantial for the jury to determine that a municipal policy or custom existed. First, sufficient evidence existed upon which a jury could find that the defendant police chief, Allan Meyers, was responsible for setting City policy concerning the execution of City arrest warrants. There was no evidence that the legislative body of the City of Kansas City, Kansas, was required to legislate policy concerning the arrest of criminal suspects. Second,

sufficient evidence existed that Chief Meyers took a deliberate course of action when he instigated "Operation Express." Defendants' argument that Meyers did not know of all the details of the sting operation does not relieve the City from liability. As the City's chief policymaker concerning arrests, Meyers was responsible for establishing final policy, regardless of how ill-informed his decision may have been. Defendants' motion for a new trial based on a lack of evidence to support the City's liability will therefore be denied.

4. Compensatory Damages.

Defendants seek a new trial on the issue of damages or, in the alternative, a denial of a new trial conditioned upon plaintiff's consent to

a remittitur. The jury in this case awarded plaintiff \$12,500 in compensatory damages for the deprivation of plaintiff's right to extradition. Defendants argue that these damages are excessive in light of the [page 19] fact that the evidence showed only a loss of \$280.00 in out-of-pocket expenses and no evidence of substantial mental anguish or emotional distress.

The Tenth Circuit has held that "absent an award so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial, the jury's determination of the amount of damages is inviolate." Lane v. Gorman, 347 F.2d 332, 335 (10th Cir. 1965). Accord Corriz v. Naranjo, 667

F.2d 892, 898 (10th Cir. 1981), cert. dismissed, 458 U.S. 1123 (1982). The fact that the damages awarded might strike us as high is not sufficient to warrant a new trial or a remittitur. Rosen v. L.T.V. Recreational Development, Inc., 569 F.2d 1117, 1123 (10th Cir. 1978).

We hold that defendants have failed to affirmatively show in their motion specific facts and circumstances from which we may infer that the jury was influenced by passion, prejudice or bias. Nor do we find the award so grossly excessive as to shock the court's conscience. Although the evidence established only a small amount of out-of-pocket expenses, there was sufficient evidence to support a larger award for damage to plaintiff's

reputaton and for embarrassment, humiliation and/or mental anguish. See Memphis Community School District v. Stachura, 106 S. Ct. 2537, 2543 (1986). It was not necessary for plaintiff to provide medical or psychiatric testimony in order for the jury to determine that plaintiff had suffered embarrassment or anguish. Defendants' motion for new [page 20] trial, or denial of new trial conditioned upon remittitur, will therefore be denied.

5. Punitive Damages.

Defendants also seek a new trial, or denial of new trial conditioned upon remittitur, on the grounds that the punitive damages awarded by the jury were excessive, were not supported by the evidence and were the product of passion and prejudice.

We will address defendants' motion in light of the same standards discussed above in part four. See Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978).

The jury awarded punitive damages against Police Chief Meyers in the amount of \$40,000; Detective Randall Murphy in the amount of \$10,000; and Lt. Ronald L. Miller in the amount of \$20,000. The jury was instructed that they could award punitive damages against a particular defendant if the defendant's conduct was shown to be motivated by "evil motive or intent" or if it involved "reckless or callous indifference" to the civil rights of the plaintiff. See Smith v. Wade, 461 U.S. 30, 56 (1982).

Defendants first argue that there was no evidence to show that

the defendants acted with evil motive or intent. We must agree. Defendants further argue that there was no evidence to show that the defendants acted in reckless or callous disregard of plaintiff's rights, given that the defendants sought advice from the United States Marshall Service, the United States Postmaster and the Wyandotte County District Attorney. Here, we must disagree. As noted above in [page 21] part one of this opinion, the advice sought by defendants dealt with other aspects of the sting operation and not with the propriety of bringing in and arresting out-of-state suspects. As we discussed earlier, the defendants should have known that mailing their notices out of state to entice suspects into the state of Kansas would violate the

suspects' rights to extradition or, at the very least, should have been on notice to have asked for specific advice as to the legality of their actions. We conclude that the defendants' failure to do so reasonably would be construed by the jury as acting in reckless disregard of the plaintiff's rights.

Defendants also argue that the amount of punitive damages was so excessive that it should shock the conscience of the court. We do not agree. We find that the punitive damages awarded bear a reasonable relationship to the actual damages awarded, the nature of the defendants' acts and the defendants' relative culpability. The amount awarded may also be characterized as reflecting the jury's desire for meaningful punishment

and effective deterrence. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981).

Additionally, defendants argue that the punitive damages were excessive given the defendants' moderate financial status and the lack of evidence as to the defendants' financial assets. It is well settled that a defendant's assets may be considered by the jury in determining the amount of punitive damages. See, e.g., Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (8th Cir. 1984); Professional Seminar [page 22] Consultants, Inc. v. Sino American Technology Exchange Council, Inc. 727 F.2d 1470, 1473 (9th Cir. 1984). However, it is the defendant who has the burden of showing his modest means if he

wishes them considered in mitigation. Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978); Tri-Ton International v. Velto 525 F.2d 432, 437-38 (9th Cir. 1975). A defendant who chooses not to offer such proof, despite his awareness of potential liability, is not entitled to a new trial or to have the verdict set aside, based on his failure to present evidence of his financial status. Zarcone, 572 F.2d at 56.

Finally, defendants assert that the punitive damages awarded were the result of an erroneous argument made by plaintiff in closing to the effect that the officers would not be personally liable for any punitive damage awards. We recognize that such an argument was probably improper and possible may have been considered by the

jury. However, we must agree with plaintiff that defendants' belated objections come too late. Defendants had the opportunity to object to plaintiff's counsel's remarks, and yet, defendants failed to object either during argument or at a bench conference immediately following argument. Defendants also failed to move for a mistrial before the case was submitted to the jury.

It is well established that a defendant's failure to object at trial or to move for a mistrial forecloses the defendant from raising the issue as grounds for a new trial. See e.g., Computerized Systems Engineering, Inc., v. Oantel Corp., 740 F.2d 59, 69 (1st Cir. 1984); Herman v. Hess [page 23] Oil Virgin Islands Corp.

524 F.2d 767, 771-72 (3d Cir. 1975);
Brown & Root, Inc. v. Big Rock Corp.,
333 F.2d 662, 666-67 (5th Cir. 1967).
We will not allow counsel to play a
waiting game to see whether the verdict
is favorable before deciding to object
to argument for the first time. Nor
will we allow defendants to rely on the
"plain error" exception to this rule.
This is not an exceptional case where a
new trial is required to prevent a
miscarriage of justice despite
defendants' lack of objection at
trial. See Federal Rule of Civil
Procedure 61. See also Wildman v.
Lerner Stores Corp. 771 F.2d 605, 609
(1st Cir. 1985).

In sum, we hold that the
punitive damages awarded were neither
excessive nor contrary to the evidence.

Nor were they the result of prejudice or passion. Accordingly, defendants' motion for a new trial, or denial of new trial conditioned on remittitur, will be denied with respect to punitive damages.

6. Jury Instructions

Defendants first assert that the court erred in deleting the word "knowingly" from instruction 9. Defendants' proposed instruction, taken from Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) § 92.02, reads as follows: "Section 1983 . . . provides that any inhabitant of this Federal District may seek redress . . . against any person or persons who . . . knowingly subjects such inhabitant to the deprivation of any rights, privileges or immunities, secured or protected by the constitution

or laws of [page 24] the United States." (emphasis added). Defendants argue that the term "knowingly" went to the reasonableness of the officers' belief that they were acting lawfully and not in violation of plaintiff's federally protected rights. We must disagree.

As we discussed above with respect to the doctrine of qualified immunity, whether the officers believed they were acting lawfully is no longer a relevant inquiry under the objective test enunciated in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The language of section 1983 itself contains no "knowingly" language, nor does the case law (as defendants concede) require that the defendants act with specific intent. We therefore hold that no error

was committed when the court deleted the word "knowingly" from the defendants' proposed instruction.

Second, defendants assert that the court erred in failing to instruct on the mitigation of damages. Specifically, defendants contend that plaintiff incurred unnecessary attorney's fees in defending against the criminal charges and that the jury should have had the opportunity to decide whether plaintiff failed to mitigate his damages. Here again, we must disagree. The mere fact that the District Attorney's Office advised plaintiff that it would dismiss the charges if plaintiff provided it with documentation to support his claim of mistaken identity did not render plaintiff's actions in hiring an attorney

unreasonable, especially here where the criminal charges carried the potential for a prison term. We therefore hold that no error was committed in denying defendants' proposed instruction on the mitigation of damages. [page 25]

Finally, defendants argue that the court erred by misstating the law in the verdict form. Defendants assert that the court's wording of the verdict form implied that the plaintiff was entitled to extradition prior to arrest or requisition by the governor's office. We find defendants' argument totally without merit. Defendants failed to object to the verdict form at trial. Ordinarily, a party waives the right to object to a faulty instruction or verdict form in a motion for new trial if he failed to raise a timely

objection before the jury retired. Lusby v. T.G. & Y. Stores, Inc., 796 F.2d 13-7, 1311 (10th Cir.), cert. denied, 107 S.Ct. 275 (1986). Federal Rule of Civil Procedure 51. An exception to this rule allows the court to review the erroneous instruction or verdict form only if it amounted to plain error. Fiedler v. McKea Corp., 605 F.2d 542, 548 n.4 (10th Cir. 1979). The court is convinced that the verdict form was based on the proper law that related to plaintiff's constitutionally protected right to extradition, see discussion supra in part one, and that no error, plain or otherwise, occurred here.

7. The Jury.

Defendants' last argument asserts that the court erred in

failing to strike Carol Meuhlberger from the jury. Shortly after being impaneled as a juror, Ms. Meuhlberger informed the court that she was a friend of the plaintiff's niece. The court questioned Ms. Meuhlberger concerning her ability to be impartial and then asked for the defendants' position on the issue. The defendants essentially agreed that [page 26] she could serve based upon her answers. By doing so, defendants waived any right to later object to her serving as a juror. See Wright & Miller, Federal Practice and Procedure § 2483 at 472-71.

In light of the foregoing, we conclude that defendants have failed to demonstrate sufficient grounds to warrant a new trial or remittitur. They have failed to show that the verdict was

against the weight of the evidence, that the damages were excessive, or that prejudicial error entered the record. We are of the opinion that justice has been done in this case. Accordingly defendants' motion for new trial will be denied.

II. Plaintiff's Motion for Attorney's Fees.

Plaintiff originally filed this action against only the City of Kansas City, Kansas. Plaintiff later amended his complaint to join the Chief of Police and six officers of the Kansas City, Kansas, Police Department, the State of Kansas, the Wyandotte County District Attorney, the Board of County Commissioners of Wyandotte County, and the Sheriff of Wyandotte County. Later,

the District Attorney, State of Kansas and Board of County Commissioners were dismissed from the action. The case went to trial on ten counts, nine of which were brought against the City and the police chief and officers. Included in these nine counts were claims under section 1983 for deprivation of liberty without due process and deprivation of plaintiff's extradition rights. Also included were tort [page 27] claims for false arrest and imprisonment, malicious prosecution, assault, battery, negligent investigation and intentional infliction of emotional distress, and a claim for expungement of plaintiff's criminal record. A tenth count was brought against the Sheriff of Wyandotte County, Kansas, for entering false information into the police department's computer.

At the close of plaintiff's evidence, the court directed a verdict in favor of the Sheriff and in favor of the other defendants on all claims except plaintiff's section 1983 claim for violation of his extradition rights. The jury found the City and four of the individual defendants liable. The court entered an order directing all law enforcement officers to expunge the criminal record of plaintiff.

Section 1988 of Title 42 of the United States Code provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." There is no doubt in this case that plaintiff was the

prevailing party and that he is entitled to an award of fees. The Court must therefore determine the proper amount to be awarded.

A. Attorney's Fees.

Initially, the court must estimate the amount of attorney's fees by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This figure is commonly known as the [page 28] "lodestar figure." The court may then make adjustments to the lodestar figure as necessary in the particular case. Blum, 465 U.S. at 888.

1. Number of Hours Reasonably Expended.

The party seeking an award of attorney's fees must submit evidence supporting the hours worked and rates claimed. Hensley, 461 U.S. at 433. The district court may exclude from this initial fee calculation hours that were not "reasonably expended." Id. at 434. The court may consider whether the hours were properly billable and whether adequate records were kept by the party. Dickerson v. Citibank & Trust Co., 590 F. Supp. 714, 717 (D. Kan. 1984). After carefully reviewing the time sheets submitted by plaintiff's counsel, the court finds that the majority of hours expended were reasonable and appropriate. However, we do find it necessary to reduce the total number by the number of hours plaintiff spent exclusively pursuing claims against

the State of Kansas, the District Attorney, the Board of County Commissioners, and Sheriff Quinn, all of which were dismissed either before trial or at the close of plaintiff's evidence. The court finds that lead counsel reasonably expended 250 hours and associates expended 184.5 hours pursuing claims against the City and its police officers.

2. Reasonable Hourly Rate.

Reasonable fees under section 1988 must be calculated according to the prevailing market rates in the relevant community. Blum, 426 U.S. at 894. The fee applicant has the burden of producing satisfactory evidence that the requested rates are in line with those prevailing in the community [page 29] for similar services

by lawyers of reasonably comparable experience, skill and reputation. Id. at 895-96 n.11. Plaintiff requests an hourly rate of \$130.00 for lead counsel and \$85.00 for his associates. The plaintiff has submitted an affidavit from an attorney practicing in the Kansas City area stating that he believes these rates to be the prevailing market rate for comparable services in Kansas City. We are not, however, convinced that these are in fact the prevailing rates. The court itself is familiar with prevailing rates in this area. The court has, in the recent past, awarded fees ranging from an hourly rate of \$60.00 to \$100.00. See, e.g., Hawkins v. Heckler, 608 F. Supp. 1201, 1206 (D. Kan. 1985) (\$100.00); Service v. Board of Public

Utilities, No. 83-2206 (D. Kan., unpublished, Nov. 13, 1986) (\$100.00); Kessler v. Farley, No. 85-2396 (D. Kan., unpublished, Sept. 8, 1986) (\$80.00); Liggett v. Kansas Dept. of Administration, No. 82-4236 (D. Kan., unpublished, Aug. 21, 1986) (\$75.00); Larson v. Bowen, No. 81-2354 (D. Kan. unpublished, July 2, 1986) (\$60.00).

The court has also awarded fees for associates' work at a rate of \$75.00.

See Service, No. 83-2206, slip op. at

5. It is the court's opinion that a reasonable hourly rate in the instant case is \$100.00 for lead counsel and \$75.00 for associates. Multiplying these hourly rates by the hours expended by each attorney, the court calculates the total amount of attorney's fees to be \$38,837.50. [page 30]

3. Assessment of Fees.

a. Reduction of the fee award.

If a plaintiff does not prevail on all claims for relief, the court must determine whether a downward adjustment of the lodestar figure is necessary. When the plaintiff fails to prevail on claims "unrelated" to those on which he succeeds, work on the unrelated, unsuccessful claims may not be compensated. Hensley, 461 U.S. at 435. These types of claims are to be treated as if they were raised in a separate lawsuit that the plaintiff lost. Id. When, however, the plaintiff's claims involve "a common core of facts or [are] based on related legal theories" the court must focus on the significance of the overall relief

obtained by the plaintiff. Id. If the plaintiff has obtained "excellent results," the attorney's fees should encompass all hours reasonably expended and no reduction should be made merely because the plaintiff failed to prevail on every claim. Id. On the other hand, if the plaintiff achieves "only partial or limited success," the product of hours expended on the entire case times a reasonably hourly rate will often be excessive. Id. at 436. The Supreme Court in Hensley stated:

There is no precise rule or formula for making these determinations. The District Court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Id. The Tenth Circuit requires that the trial court consider the results

obtained relative to the relief requested, the [page 31] importance of the issues on which plaintiff prevailed, and whether the claims on which plaintiff prevailed related to unsuccessful claims. Hernandez v. George, 793 F.2d 264, 266 (10th Cir. 1986).

The court finds in the instant case that plaintiff's claims for relief involved a common core of facts and were based on somewhat related legal theories. Additionally, the court finds that plaintiff obtained most of the relief requested; not only did plaintiff receive compensatory and punitive damages, but he also obtained an order expunging his criminal record. However, the court does not believe this to be a case where the plaintiff has obtained

"excellent results," mandating that plaintiff's attorneys receive a fully compensatory fee. Plaintiff's case against the City and its police officers went to trial on nine separate counts. Only one count went to the jury.

In light of the above, the court finds it necessary to reduce the amount of the lodestar figure. Rather than attempt the near-impossible task of identifying certain hours to be eliminated, the court will reduce the award to account for the less than total success. It is the court's equitable judgment that the lodestar amount should be reduced by one-third, resulting in a total attorney fee award of \$25,891.40.

b. Enhancement of the
Fee Award.

Plaintiff's attorneys assert that there is sufficient evidence in the record to warrant upward adjustment of the lodestar figure. Counsel contend that due to the [page 32] contingency fee arrangement, they bore significant risk of loss in the event that plaintiff's claims were unsuccessful. They also contend that they provided plaintiff with an exceptional quality of representation and that the legal issues were of a novel and difficult nature. Counsel also claim that this case was rather "undesirable" because it involved prosecuting an action against the City of Kansas City, Kansas.

We do not believe that this case merits upward adjustment of the lodestar figure. Upward adjustments

of the lodestar calculation are proper only in certain "rare" and "exceptional" cases supported by specific evidence. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088, 3098 (1986); Blum, 465 U.S. at 901. The burden of proving that an upward adjustment is required is on the fee applicant. Id. Most of the reasons offered by plaintiff's attorneys to support upward adjustment are similar to those reasons rejected by the court in Blum of "novelty [and] complexity of the issues," "special skill and experience of counsel," "quality of representation," and "results obtained." Id. The court in Blum held that such factors are fully reflected in the lodestar amount and may not serve as independent bases for increasing the

basic fee award. Id. at 898, 900.
Accord. Delaware Valley, 106 S. Ct. at
3098.

The court therefore holds
that no upward adjustment of the
lodestar figure is required.
Plaintiff's counsel will be awarded
attorney's fees in the amount of
\$25,891.40.

B. Paralegal Fees.

In addition to awarding
the prevailing party attorney's fees, we
may also award fees for paralegal time
reasonably spent on the case. Ramos v.
Lamm, 713 F.2d 546, 558-59 (10th Cir.
1983). Plaintiff has requested an award
of fees for 195.5 hours at an hourly
rate of \$50.00.

The affidavit submitted on
behalf of plaintiff states that \$50.00

is a reasonable hourly rate for paralegal time in the Kansas City Area. The court is not convinced, however, that it is in fact reasonable. We have addressed the issue of paralegal fees in only a small number of cases. In those cases we awarded fees at \$30.00 an hour (see Powell v. Control Date Corp., No. 83-2154 (D. Kan., unpublished, Apr. 22, 1985)) and \$25.00 an hour (see Seymour v. Clemens & Green, Inc., No. 82-2237 (D. Kan., unpublished, March 13, 1984)). The court recognizes that these cases are several years old and that some increase in the rate may be justifiable. The court finds \$35.00 to be an appropriate hourly fee for paralegal services.

Defendants argue that the number of hours requested for

paralegal time should be reduced because the paralegal's presence at trial was unnecessary. We must agree. Two attorneys were present at all times during the trial. We can see no need in this type of case for the additional presence of a paralegal. The court will therefore deduct the number of hours the paralegal spent at trial from the requested number, resulting in a total of 151.5 hours. The court will further reduce this number by one-third to account for the plaintiff's less than total success. Plaintiff's [sic] will be awarded a total of \$3,535.00 in paralegal fees. [page 34]

C. Conclusion.

In sum, the court holds that plaintiff is entitled to a total award of \$29,426.40 for attorney's and

paralegal's fees. The court recognizes that plaintiff's counsel entered into a one-third contingent fee arrangement with plaintiff. Under that agreement, plaintiff's counsel would be entitled to \$27,500.00. Despite the fact that the court's award of fees is greater than the amount owed to the attorney under the contingent fee arrangement, plaintiff's counsel is entitled to the full amount of the fees awarded by the court. See Cooper v. Singer, 719 F.2d 1496, 1507 (10th Cir. 1983).

III. Defendants' Motion for Review of the Clerk's Taxation of Costs.

Review of the clerk's assessment of costs is a de novo review addressed to the sound discretion of the court.

Farmer v. Arabian American Oil Co., 379 U.S. 227, 232-33 (1964). The court must allow the prevailing party to recover all costs authorized by 28 U.S.C. §1920 unless some reason appears for penalizing the prevailing party. True Temper Corp. v. CF&I Steel Corp., 601 F.2d 495, 509-100 (10th Cir. 1979). Where expenses are not specifically authorized by section 1920, the court should sparingly exercise its discretion in allowing such costs. Farmer, 379 U.S. at 235.

Defendants urge that all costs for postage, copies, depositions, long-distance telephone calls and computer-assisted research time should be denied. [page 35]

A. Copies.

Section 1920 provides for taxation of costs of copies only if they were "necessarily obtained for use in the case." Plaintiff's itemization of copy costs provides no information as to what items were copies or for what purposes they were used. Absent such information, the court may disallow these expenses. American Key Corp. v. Cumberland Assoc., 102 F.R.D. 496, 499 (N.D. Ga. 1984). The court in this instance will reserve ruling on whether these copies are properly taxable and will allow plaintiff the opportunity to provide us with further information as to the nature of the documents copied and how they were necessary for trial.

B. Postage and Toll Calls.

Neither postage nor toll calls are listed in section 1920 as items

properly taxable as costs. Finding no statutory authority for these items, the court, in its discretion, will deny taxation of such items. See Hollenbeck v. Falstaff Brewing Corp., 605 F. Supp. 421, 439 (E.D. Mo. 1985); Wolfe v. Wolfe, 570 F. Supp. 826, 828 (D.S.C. 1983). See also 6 J. Moore, Moore's Federal Practice ¶54.77[8] at 54.480 (1986).

C. Computer-Assisted Research Expenses.

Similarly, section 1920 makes no express provision for taxing computerized legal research expenses. Some courts, recognizing that use of computerized legal research is totally reasonable, if not essential, in contemporary legal practice, have allowed costs for such expenses. See.

e.g., Wehr v. Burroughs Corp. 619 F.2d 276, 285 (3d Cir. 1980). The [page 36] majority of courts, however, have refused to tax such expenses because they are not specifically listed in section 1920. These courts reason that such expenses should be treated as attorney's costs absorbed by the attorney's overhead and fees rather than as ordinary costs. See e.g., Leftwich v. Harris-Stowe State College, 702 F.2d 686, 695 (8th Cir. 1983); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 309 n.75 (2d Cir. 1979); Litton Systems, Inc. v. AT&T, 613 F. Supp. 824, 836 (S.D.N.Y. 1985); Roberts v. Charter National Life Insurance Co., 112 F.R.D. 411, 413 (S.D. Fla. 1986). See also Moore, supra, ±54.77[8] at 54, 480, 481. We believe the majority rule to be

the most reasonable approach and will deny taxation of costs for computer-assisted research expenses.

D. Depositions.

The court has great discretion to tax deposition costs if it finds the deposition was "necessarily obtained for use in the case." Miller v. City of Mission, 516 F. supp. 1333, 1340 (D. Kan. 1981). All but one of the deposition witnesses testified at trial. The court finds that the depositions for which plaintiff seeks costs were not purely investigatory in nature and were necessary for proper examination at trial. The court therefore finds the deposition costs properly taxable.

The court also finds that copies of these depositions are also properly taxable because the copies were

reasonably necessary to litigation of the case. See Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983). The costs of these copies will be allowed pursuant to 28 U.S.C. § 1920(4) as fees for exemplification and copies of papers. See Ramos, 713 F.2d at 560. [page 37]

IT IS THEREFORE ORDERED that defendants' motions for judgment notwithstanding the verdict, for new trial and/or remittitur are denied.

IT IS FURTHER ORDERED that plaintiff's motion for attorney's fees is granted. Plaintiff's attorneys are awarded a total of \$29,426.40 in fees.

IT IS FURTHER ORDERED that the clerk's assessment of costs is affirmed with the exception of the following: \$842.10 for copies; \$421.37 for postage; \$54.30 for long-distance calls; and

\$97.76 for Westlaw research time. Plaintiff shall have twenty (20) days from the date of this order to provide the requested information as to copy expenses. Defendants shall have ten (10) days thereafter to make their objections. The court will at that time rule on whether the copy expenses as taxed by the clerk are proper.

Dated this 18th day of March, 1987,
at Kansas City, Kansas.

/s/ Earl E. O'Connor

EARL E. O'CONNOR, Chief Judge



Supreme Court, U.S.
FILED

OCT -9 1989

JOSEPH F. SPANIOLO, JR.
CLERK

2
No. 89-334

In the Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP ORTEGA,
Petitioner,

vs.

CITY OF KANSAS CITY, KANSAS,
a Municipal Corporation,
POLICE CHIEF ALLAN MEYERS,
DETECTIVE RANDALL MURPHY,
LT. RONALD L. MILLER,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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October 4, 1989

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STATEMENT OF THE CASE

Respondents concur with Petitioner's Statement of the Case.

REASONS WHY WRIT SHOULD BE DENIED

A. Summary of Argument

Although petitioner does not specifically identify the subsection of Supreme Court Rule 17.1 on which he relies in seeking a writ of certiorari, he evidently contends that this case presents "an important question of federal law which has not been, but should be, settled by this Court," Sup.Ct. Rule 17.1(c), and that the Tenth Circuit's decision is "in conflict with the decision of another federal court of appeals on the same matter." Sup.Ct. Rule 17.1(a).

Petitioner asserts that the ruling by the Tenth Circuit Court of Appeals is one of "first impression" and has "in effect erased from the Constitution a substantial portion of the extradition guaranties granted to every person of the United States of America." (Petitioner's brief, pp. 10 and 17).

Although petitioner does not argue that the Tenth Circuit's decision is in direct conflict with the decisions of the other circuits, he asserts that the Tenth Circuit "narrowly" interpreted cases from five other circuits. (Petitioner's brief, pp. 14 and 15).

Contrary to petitioner's contention, this case does not present an important question of federal law. The petitioner repeatedly states that the Tenth Circuit's decision jeopardizes a person's pre-arrest right to extradition. Petitioner, however, fails to identify any source

in the Constitution, federal statutes, or case law that creates a right to extradition prior to arrest. As the Tenth Circuit emphasized, both Article IV, Section 2, Clause 2 of the United States Constitution and 18 U.S.C. Sec. 3182 (1985) refer to extradition on "demand." *Ortega v. City of Kansas City, Kansas*, 875 F.2d 1497, 1499-1500 (10th Cir. 1989).

Lacking any source for a pre-arrest right to extradition, petitioner resorts to histrionics to create the impression of an important federal question. Petitioner claims that the Tenth Circuit's decision "has made obsolete the procedures of extradition, with all of its safeguards employed for more than 200 years, and replaced it with procedure of luring and enticing suspects across state lines." (Petitioner's brief, p. 21). The claim that extradition procedures have been rendered "obsolete" greatly exaggerates the impact of the Tenth Circuit's decision.

Not only has petitioner failed to demonstrate an important federal question, he has failed to demonstrate a conflict among the circuits. This cannot be both a case of first impression and a case in which the circuits are in conflict "in the same matter." Sup.Ct. Rule 17.1(a). What petitioner calls a "narrow" interpretation of the cases of six circuits was simply a recognition by the Tenth Circuit that cases dealing with post-arrest extradition rights are of limited precedential value in determining whether a right to extradition exists prior to arrest. *Id.*, at 1500.

In the absence of an important federal question or a conflict among the circuits, petitioner's application for a writ of certiorari should be denied.

B. Analysis

(1) THE TENTH CIRCUIT'S REASONING IS CORRECT UNDER THE APPLICABLE RULES OF STATUTORY CONSTRUCTION.

In ruling that the petitioner did not have a right to extradition prior to arrest, the Tenth Circuit relied on the plain meaning of Article IV, Section 2, Clause 2 of the United States Constitution and 18 U.S.C. Sec. 3182 (1985).

Article IV, Section 2, Clause 2 states as follows:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall *on demand of the executive Authority of the State from which he fled*, be delivered up to be removed to the State having Jurisdiction of the Crime. (Emphasis added)

Section 3182 of Title 18, which implements the above constitutional provision, states as follows:

Whenever the executive authority of any State or Territory *demand*s any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person *demand*ed with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such de-

mand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. (Emphasis added)

Both Article IV, Section 2, Clause 2 and 18 U.S.C. Sec. 3182 plainly condition the right to extradition on "demand." As the Tenth Circuit noted, the conclusion that the right to extradition is triggered by demand made by one jurisdiction for the surrender of a person in another jurisdiction is consistent with the Supreme Court's definition of extradition, *see id.*, at 1499-1500 (quoting *Terlinden v. Ames*, 184 U.S. 270 (1902)), and is critical to interstate rendition as well. *Id.*, at 1500 (citing *Innes v. Tobin*, 240 U.S. 127, 133 (1916)).

Given the express reference to "demand" in both Article IV, Section 2, Clause 2 and 18 U.S.C. Sec. 3182, petitioner's contention that the Tenth Circuit "ignores the plain meaning of the Constitutional provision and federal statutes" (Petitioner's brief, p. 11) is insupportable. Article IV, Section 2, Clause 2 does not require that a charging state demand the arrest of a fugitive from an asylum state. Section 3182 provides that upon demand "the executive Authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured," but does not *require* that the executive authority of the charging state demand the fugitive's arrest. Only when the fugitive is taken into custody in the asylum state must extradition procedures be used.

The Court has emphasized that constitutional and statutory provisions should be given their plain mean-

ings when possible. See *United States v. James*, 478 U.S. 597 (1986); *United States v. Turkette*, 452 U.S. 576 (1981); *Rubin v. United States*, 449 U.S. 424 (1981); *United States v. Standard Brewery*, 251 U.S. 210 (1920); *United States v. Hill*, 248 U.S. 420 (1919); *Caminetti v. United States*, 242 U.S. 470 (1917).

Respondents urge this Court to affirm the Tenth Circuit's reasoning and conclusion that there must be a demand by the executive authority of the charging state or an arrest in the asylum state to invoke the extradition process and its attendant rights.

(2) PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner has failed to identify any source in the Constitution or federal law that establishes a pre-arrest right to extradition. Despite the absence of any identifiable constitutional right to extradition prior to arrest, petitioner argues that the Tenth Circuit's decision would render "obsolete the procedures of extradition." (Petitioner's brief, p. 21).

Petitioner's prediction is groundless. Far from doing away with extradition and habeas corpus proceedings, the Tenth Circuit's decision will have little impact on traditional procedures employed to apprehend fugitives. As a practical matter, sting operations of the type executed in this case only snare suspects who can be found in a small radius surrounding a metropolitan area. The Tenth Circuit's decision does not affect the extradition rights of fugitives who are arrested in an asylum state.

Petitioner also argues that the Tenth Circuit's decision will encourage resort to "trickery" as law enforcement authorities attempt to lure fugitives back into their states to avoid having to extradite them, but petitioner fails to explain why the use of trickery is inappropriate to capture suspected criminals who have fled the state, as long as constitutional rights are not violated. Indeed, trickery is a legitimate law enforcement tool. For example, an element of trickery is involved every time a narcotics agent poses as a drug buyer. A risk exists that the wrong person will be lured across the state line, but petitioner has not shown that this risk is significant.

As the Tenth Circuit recognized, *id.*, at 1501, the use of trickery cannot be equated with the use of force. A fugitive who receives a notice that his "package" can be claimed across the state line remains free to stay put. If the fugitive chooses to claim the package, he presumably does so with knowledge that he may be apprehended when he crosses the border.

Finally, petitioner, apparently trying to bolster his policy argument, claims that his arrest has resulted in a criminal record that could adversely affect his livelihood. Mr. Ortega's criminal arrest record, however, was expunged by agreement of the parties and order of the trial court.

This case does not present an important question of federal law that merits Supreme Court review. For this reason, petitioner's application for writ of certiorari should be denied.

(3) THERE IS NO CONFLICT BETWEEN THE TENTH CIRCUIT OPINION AND OTHER CIRCUIT COURTS OF APPEAL.

Although petitioner correctly asserts that this is a case of first impression and that he "has been unable to locate any cases dealing with rights of extradition prior to demand or arrest in an asylum state" (Petitioner's brief, p. 17), he nonetheless argues that the Tenth Circuit "narrowly" interpreted the cases of six circuits to find that a violation of extradition rights occurs only after arrest and transportation of the suspect against his will. See *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986); *Ross v. Meagan*, 638 F.2d 646 (3rd Cir. 1981); *Crumley v. Snead*, 620 F.2d 481 (5th Cir. 1980); *Brown v. Nutsch*, 619 F.2d 758 (8th Cir. 1980); *Wirth v. Surles*, 562 F.2d 319 (4th Cir. 1977); *Sanders v. Conine*, 506 F.2d 530 (10th Cir. 1974).

The Tenth Circuit reasonably distinguished the cited cases. The Court noted that "[i]n each of these cases plaintiff was restrained or deprived of his liberty outside the jurisdiction of the state issuing the warrant and then transported against his will." *Ortega*, 875 F.2d at 1500. The Court observed that the question presented in this case "is not so simple." *Id.*, at 1500. Petitioner was arrested in Kansas, the jurisdiction that had issued the warrant for his arrest, and was not transported across the state line. The Court reasoned that because Kansas authorities did not demand that Missouri surrender petitioner, no right to extradition proceedings arose. *Id.*, at 1500.

The "narrow" interpretation assertedly given by the Tenth Circuit does not implicate any of the enumerated principles governing review by certiorari under Sup.Ct.